Municipal Services Agency Robert B. Leonard, Administrator



County of Sacramento

September 30, 2011

Mr. Joe Grindstaff Executive Officer Delta Stewardship Council 980 Ninth Street, Suite 1500 Sacramento, CA 95814

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

Dear Mr. Grindstaff:

Sacramento County respectfully submits comments and recommendations on the Fifth Draft of the Delta Plan (Plan). We can appreciate the complexity involved and myriad challenges the DSC faces in developing a policy and regulatory platform for the Delta. We also acknowledge that significant actions are needed to ensure that the natural, economic, and cultural resources of the Delta are protected and sustained for the benefit of all. Despite providing consistent and reasonable recommendations and suggestions on a myriad of policy and processing issues, Sacramento County is troubled that the Plan does not seem to be evolving in such a manner. Our concerns continue to center around the following: 1) the geographic authority of the DSC, 2) consistency and inclusion of other plans into the Plan, and 3) inclusion of the Bay Delta Conservation Plan (BDCP) into the Plan.

While this letter will revisit and reiterate some of our past concerns, we encourage your staff to review our previous detailed comments on Drafts #2, #3, and #4 (April 15, May 6, and June 23, 2011, respectively). The following comments and suggestions focus on the Plan's procedures, policies, and recommendations that continue to conflict with the statutory provisions of the Sacramento-San Joaquin Delta Reform Act of 2009 (Act) and run counter to Sacramento County's land use, flood control, habitat preservation, and water management policies and principles.

DSC's Geographic Considerations (pgs. 16 and 56)

As expressed in our previous written comments, Sacramento County is extremely concerned that the DSC is proposing to exercise land use, water management, and ecosystem protection authority well beyond the legal Delta and Suisun Marsh. While the current draft (pg. 56, lines 9-10) indicates "the requirement of consistency with the Plan applies only to covered actions that

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 2

occur in whole or in part in the Delta," we remain concerned about a subsequent passage (pg. 56, lines 15-27) which references Figure 1-1 (pg. 16) and contains the following statement:

Implementation of the Plan also may affect other areas of California, including the Delta watershed, the Trinity River watershed, and areas outside the Delta which exported water is used.

As indicated in our past comment letters, Sacramento County agrees the Act does confer "some" authority to implement actions outside the legal Delta and Suisun Marsh. However, the vast Study Area illustrated on Figure 1-1, which is tantamount to statewide oversight, was not the intent of the State Legislature nor statutorily provided for in the Act. Without greater clarity, such as a list of specific projects, programs, and/or actions proposed outside the Delta's statutory confines that would be subject to the DSC's consistency certification process and oversight, the Plan risks becoming an unmanageable and unrealistic policy tool for achieving and addressing the coequal goals.

Governance (Chapter 3)

Covered Action: The current Plan clarifies that a project meeting the "ministerial" definition (per the California Environmental Quality Act (CEQA)) will not be deemed a "covered action" (pg. 58, lines 24-25) and, therefore, is exempt from the project consistency certification process. This key regulatory change over prior versions of the Plan gives some indication of the DSC's willingness to respect local issues and to make the necessary implementation adjustments.

However, it only begins to touch on the concerns on this issue expressed by Sacramento County throughout the evolution of the Plan. We believe it is important to restate a concern cited in our June 23, 2011 comment letter: Exempting "ministerial actions" from the consistency certification process is meaningless if the DSC's exemption criteria will subject existing General Plans, land use ordinances, water management and drainage ordinances, and other regulations to the consistency certification process. While the DSC's letter to Sacramento County dated August 12, 2011, appears to clarify that this is not the case, the letter also states that "new ordinances and plans and updates to existing ordinances and plans however, would still be covered actions and evaluations of consistency would be needed." This requirement is significantly problematic for Sacramento County and all local governments.

Again, Sacramento County is appreciative of the DSC's efforts to refine and clarify the covered action determination process. However, we continue to struggle with the ultimate interpretation of Water Code section 85057.5 (a)(4) which states that a covered action is a plan, program, or project that will have a "significant impact" on the achievement of one or both of the coequal goals (Water Code section 85057.5(4)). As shared with the DSC many times, without a consistent, measurable, and predictable definition of "significant," the Plan will not be an effective policy/regulatory tool to address and maintain the coequal goals. Further, in order to

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 3

adequately determine what is/is not a covered action, the Plan and the Administrative Procedures (Appendix B) adopted by the DSC in September 2010 require further revision to describe specifically how a local government (or permitting agency) can demonstrate that a project will/will not have a "significant impact" on the achievement of one or both of the coequal goals. For example, does the DSC intend to rely on CEQA's definition of "significant effect on the environment" (section 15382 of the CEQA Guidelines)? Refer to our comment letter dated June 23, 2011, on Draft #4.

Written comments (dated January 27, 2011) on the NOP for the Plan's Draft EIR expressed Sacramento County's concern about the potential impact that the Plan's forthcoming policies and procedures could have on roadway and/or transportation system improvement/maintenance projects in the Delta. Again, because the "covered actions" definition continues to evolve, Sacramento County requests the Plan (or the Administrative Procedures, Appendix B) be very clear in acknowledging that roadway maintenance, design, and development projects are not "covered actions" and are therefore exempt from the project consistency certification process. Roadway maintenance projects are just that, maintenance to roadways that already exist. Both roadway design and development projects are already subject to CEQA review, which subjects these projects to a comprehensive environmental review and assessment. Including these projects as "covered actions" would be redundant. Further, it appears the Delta Reform Act (i.e., Water Code section 85057.5 (b), paragraphs (2) and (5)) provides the DSC with the authority to make this determination. See below:

- (b) "Covered action" does not include any of the following:
 - (2) <u>Routine maintenance and operation</u> of the State Water Project or the federal Central Valley Project.
 - (5) Routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency.

Certification of Consistency (pg. 60): As you know, compliance with the Covered Action process has been an on-going point of concern. DSC staff (the Plan Implementation Team) has been very gracious with their time and willingness to meet and discuss the process. While the recent release of the draft "Certification of Consistency Form" provides a bit more guidance, the process continues to cause concern, especially the timing of the submittal of a certification of consistency request. As shared with DSC staff, it is critical that local governments provide project proponents/applicants with as much certainty and predictability as possible. As a result, we believe it makes sense to initiate the certification of consistency process within 30 days of project/entitlement submittal (at the local level). However, as indicated in the draft form, it appears the DSC is suggesting the certification of consistency request would follow the release of the project-specific environmental assessment, which for Sacramento County could be three or four months into the local land use planning review process. Any sort of delay (or potential for delay) at this stage of the local land use review/approval process would be problematic. We

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 4

respectfully ask DSC staff to revisit the procedural requirements and the time involved for a certificate of consistency.

Pursuant to Water Code section 85225.10, any person may file an appeal who claims that a covered action is inconsistent with the Plan. However, as stated many times during public hearings before the DSC, and in writing, the uncertainty regarding who, and most importantly under what legal grounds can an appeal can be filed, is very disconcerting for Sacramento County and all local governments. As an example, without specific criteria and guidance, a person in San Diego could file an appeal of Butte County's certificate of consistency.

The potential for abuse of the appeal process is also significant, not to mention the impact on the workload of the DSC. Furthermore, the adopted Administrative Procedures allow any member of the DSC or its executive officer to file an appeal of a certification of consistency. This procedure compromises the independence and appeal function of the DSC. Therefore, it is critical the Plan, the Administrative Procedures, and/or the recently released draft "Certification of Consistency Appeal Form" be revised to include more guidance as to the requisite standing to file an appeal of a consistency certification.

<u>GP1</u>, <u>Certification of Consistency</u> (pgs. 60-61): This policy requires a covered action to be consistent with each of the policies contained in the Plan that is "implicated by the covered action." However, pursuant to Water Code section 85225.10, a covered action must not have a significant adverse impact on the achievement of the coequal goals, not on whether the proposed covered action is consistent with each of the Plan's twelve (proposed) policies.

While the Plan requires consistency with the proposed polices and the eight "inherent objectives" listed in Water Code section 85020, the Plan also recognizes that there will be circumstances when "full" consistency will not be feasible. In such cases the Plan requires that project proponents establish that consistency is not feasible and explain how the covered action, nevertheless, on whole is consistent with the coequal goals (pg. 60, lines 16-18). However, the Plan is absent clear direction as to how a covered action will be treated if it meets one, but not all, of the goals. For example, if a covered action will enhance and protect the ecosystem but does not meet/address the goal of providing a more reliable water supply, how does the consistency requirement apply?

Similarly, for purposes of the consistency determination, there is no guidance about (or recognition of) the relationship between the "coequal goals" and the statutory requirement that such goals "shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta." For example, could a covered action be deemed inconsistent even if it is necessary for protecting and enhancing the cultural, recreational and agricultural values of the Delta? To provide greater certainty, the Plan must include a definitive and measurable standard by which the DSC may determine such consistency when, on its face, a covered action is not "fully consistent" with the Plan's policies.

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 5

Lastly, GP1 confers the DSC with the authority to determine covered action consistency, yet the Plan does not provide any objective or quantifiable criterion/standard by which such determination will be made.

<u>Discretionary Incorporation of Another Plan/Program (pg. 61)</u>: The Plan appears to establish two different and distinct standards of consistency regarding incorporated plans. It provides that at time of incorporation the DSC can decide whether future covered actions must be consistent with both the incorporated plan and some or all of the provisions of the Plan or only with the incorporated plan. In other words, this dual provision seems to provide the DSC with the ability to amend the Plan by imposing the requirements of another plan in lieu of those in the Plan itself. It is very important that the next revision of the Plan include some sort of qualifier to ensure this "dual provision" is not misinterpreted and, in turn, not implemented as intended.

A More Reliable Water Supply (Chapter 4)

WR P1, Covered Actions and Water Exports/Transfers (pgs. 82-84): This policy indicates that a covered action is de facto inconsistent with the Plan if the action negatively impacts one or more of the coequal goals and one or more of the water suppliers that receive water from the Delta significantly causes the need for the covered action by failing to comply with certain requirements. The Plan must be revised to include specific guidance as to whom or what agency will make the determination that a water supplier/exporter has met (or violated) the coequal goals mandate.

Further, as indicated in our June 23rd comments on Draft #4, a subset of WR P1 requires that the Water Reliability Element in an Urban Water Management Plan and/or Agricultural Water Management Plan include a plan for possible interruption of the Delta water supply (pg. 83). As with the consistency finding requirement described above, it remains unclear how this requirement promotes accountability in achieving the coequal goals.

If the next version of the Plan cannot provide detailed guidance on how both of the policy requirements will address the coequal goals mandate, they should be eliminated from the Plan.

Restore the Delta Ecosystem (Chapter 5)

ER P2, Habitat Restoration Consistency (pg. 117, lines 21-25): It is critically important that future implementation of this policy will not impede Sacramento County's ability to restore and/or create habitat in targeted areas that might not be 100 percent consistent with the habitat types delineated and identified on Figure 5-2. Therefore, rather than relying on the Conservation Strategy for Restoration of the Sac-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions as the lone benchmark for determining habitat consistency, we strongly recommend that this policy be amended to offer greater flexibility, which will foster and encourage additional ecosystem restoration options and opportunities.

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 6

ER P3, Habitat Restoration Mitigation (pg. 117, lines 29-37): It is important that the Plan be revised to clearly demonstrate that this policy will not preclude the implementation of a local government's habitat protection strategies as set forth in approved Habitat Conservation Plans (HCPs). As an example, protection of cropland cover types for avian species could be interpreted as adversely impacting opportunities for "Delta specific" habitat restoration. Further, encumbering an agricultural property with a conservation easement could be viewed as a means to preclude "consistent" restoration activities and therefore would be determined to be inconsistent with the Plan. Sacramento County opposes any policy that would require a local government to mitigate conservation efforts because those efforts don't comply with what the authors of the Plan envision for this area (i.e., restoration of an intertidal, sub-tidal, or seasonal floodplain). As a an alternative, we recommend the Plan include some sort of a "HCP/NCCP exemption" to ensure that local conservation management strategies are not precluded or compromised by this policy.

Sacramento County is also very concerned that the following provision, embedded in ER P3, has the potential to usurp the local land use planning process:

... shall demonstrate that they have, in consultation with the Department of Fish and Game, avoided or mitigated within the Delta the adverse impacts to the opportunity for habitat restoration at elevations shown in Figure 5-2.

As a result, Sacramento County recommends the Plan be expanded to describe the specific process and/or include a list of findings the DSC will consider to have adequately satisfied the "demonstration" test as cited above.

Improve Water Quality to Protect Human Health and the Environment (Chapter 6)

One of the key mechanisms for mitigation impacts of pesticides is the establishment of use requirements and restrictions under the Food and Agriculture Code. As recognized in its Management Agency Agreement with the State Water Resources Control Board (SWQCB), the California Department of Pesticide Regulation (DPR) is the primary State agency for regulation of pesticide use and should be a key player in addressing water quality impacts. This is particularly important because DPR's regulatory tools can be applied proactively to prevent the contamination of water before it is discharged. Therefore, we suggest the following recommendation be added to the Plan:

DPR, in consultation with SWRCB and the Central Valley Regional Water Quality Control Board, should identify and implement opportunities to exercise its authority over pesticide registration and use, to ensure that legal applications of pesticides do not adversely impact water quality in the Delta.

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 7

Registration of pesticides by the U.S. EPA Office of Pesticides (OPP) is supposed to include consideration of water quality impacts, and mitigation measures established during this process are a primary tool for preventing negative impacts on water quality. Recent experience with pesticides used in both urban and agricultural settings indicate that there are significant ways in which OPP can improve its process to achieve stronger water quality protection through its registration process. State pesticide and water quality regulators, as well as end users of pesticides, should be able to have confidence that when currently registered pesticides are used according to label requirements, they will not cause water quality impairments. Therefore, we suggest the addition of the following recommendation:

The California Department of Pesticide Regulation, the State Water Resources Control Board, and the Central Valley Regional Water Quality Control Board should actively encourage the USEPA Office of Pesticide Programs to establish policies and procedures that will evaluate and require mitigation for the water quality impacts of pesticides, so that legal applications of pesticides do not adversely impact water quality in the Delta.

Numerous activities and projects that are foreseeable in the future, such as carbon sequestration, island flooding, wetland restoration, and changes in flow, have the capacity to increase the release, mobilization or transformation of pollutants, such as mercury, that present in the Delta. The following recommendations should be added to the Plan to address this concern:

The State Water Resources Control Board and the Central Valley Regional Water Quality Control Board should exercise their authority to monitor and mitigate the water quality impacts of projects and activities associated with management of Delta resources, especially those that have high potential to exacerbate top priority water quality impairments such as mercury.

Agencies that implement or provide funds for projects in the Delta must include plans and provide funding to monitor and mitigate water quality impairments.

Lastly, DPR is in final stages of adopting Surface Water Protection Regulations (scheduled for 2012) and has initiated a process to establish a system to more reliably identify and prevent water quality impacts of new active ingredients. Once adopted these new regulations and requirements should be added to the Plan's list of "Administrative Performance Measures" (pgs. 149-150).

Risk Reduction (Chapter 7)

Risk Reduction Policy RR P3 (and Table 7-1) is especially problematic for Sacramento County as this policy appears to predetermine allowable land use based solely on levee structure and runs counter to the evolving covered action and project consistency certification processes outlined in the Plan. Furthermore, RR P3 conflicts with the key objectives of the Delta

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 8

Protection Commission's forthcoming Economic Sustainability Plan (ESP) as it will essentially eliminate opportunities for future economic growth and development in many areas of the Delta. Please refer to our August 24, 2011 letter for Sacramento County's detailed concerns and recommendations.

RR R8, Immunity for Flood Protection (pg. 181, lines 33-34): While this recommendation provides specific immunity for public safety flood protection activities, it should be expanded to ensure the waiver will apply to local agencies, as well as the State.

California Delta as an Evolving Place (Chapter 8)

Seven of the eleven legacy communities identified in the Delta Reform Act (Public Resources Code section 32301(f)) are located in Sacramento County. Sacramento County continues to advocate that the Plan include reasonable and implementable policies and recommendations that will set the framework for the long-term sustainability of Courtland, Freeport, Hood, Isleton, Locke, Ryde, and Walnut Grove (and all legacy communities). While Chapter 8 includes six "recommendations" intended to address the "Delta as a Place" problem statements described on pages 197-199, these recommendations seem to focus on coordination and input from various State agencies (i.e., DP R3 through DP R6). Absent is a specific "policy action" that commits the DSC and/or its staff to proactively engage, inform, and educate Delta residents and business owners about the DSC's role in addressing the coequal goals, while at the same time being sensitive to the socio-economic structure of the Delta region. As suggested at the "Delta as an Evolving Place" workgroup meeting held on September 19, 2011, regularly scheduled community-based meetings (e.g., quarterly) would be an appropriate approach. Moreover, if the Plan is to serve as a primary land use, water management, ecosystem restoration, and flood control blueprint for the next 50+ years, as called for in the Act, community support and input must be a key component of the implementation framework.

In closing, Sacramento County is hopeful the DSC and its staff find our comments helpful. The Plan's policies and recommendations must be clear, measurable, and reasonable. We are concerned that lacking genuine consideration of the comments and recommendations suggested by Sacramento County (and other impacted agencies), as well recognizing and integrating existing regulatory policies, resource plans, and local ordinances already that support the coequal goals cited in Water Code section 85054, that the Plan will not be implementable. Incorporating input from local governments and the region's stakeholders is a critical component in achieving and addressing the coequal goals mandate. As a result, we very much want to continue our working and collaborative partnership with DSC staff. We look forward to the

Re: Comments on the Fifth Draft of the Delta Stewardship Council's (DSC) Delta Plan

September 30, 2011

Page 9

release of Draft #6 and the accompanying environmental document. Should you have questions about the comments contained herein, please contact Don Thomas, Senior Planner, at (916) 874-5140.

Sincerely,

Robert B. Leonard, Administrator

Municipal Services Agency

RL:gs

cc:

M. Peterson

D. Thomas